

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 39577-s41E BY HOWARD KRUSE)

* * * * *

No exception or objection has been entered to the Proposal for Decision in this matter. The same is hereby made final and is expressly incorporated herein.

WHEREFORE, Application for Beneficial Water Use Permit No. 39577-s41E is hereby granted to Howard Kruse to appropriate 350 gallons per minute up to 60 acre-feet per year for placer mining purposes. The source of supply shall be a certain unnamed tributary to High Ore Creek, the waters thereof to be diverted at points in the NW1/4 NW1/4 NW1/4 of Section 12, Township 6 North, Range 5 West, and/or at points in the S1/2 SW1/4 SW1/4 and/or at points in the W1/2 E1/2 SW1/4, all of Section 1, Township 6 North, Range 5 West, in Jefferson County. The place of use shall be confined to the previously described areas. In no event shall the waters provided for herein be diverted prior to April 1 of any given year nor subsequent to August 31 of any given year.

The priority date for this permit shall be December 21, 1981, at 12:00 noon.

This Permit is subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.


B. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 16th day of December, 1983.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Mary R. Lohrman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on December 16, 1983, she deposited in the United States mail, certified mail, an order by the Department on the Application by Howard Kruse, Application No. 39577-s41E, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard Kruse, Box 86, Clancy, MT 59634
2. Montana Power Co., 40 E. Broadway, Butte, MT 59701
3. K. Paul Stahl, P.O. Box 1715, Helena, MT 59624
4. Bureau of Land Management, Box 3388, Butte, MT 59702
5. T.J. Reynolds, Helena Field Office (inter-department mail)
6. Matt Williams, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Mary R. Lohrman

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 16th day of DECEMBER, 1983, before me, a Notary Public in and for said state, personally appeared Mary Lohrman, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Sam P. Gilman

Notary Public for the State of Montana
Residing at HELENA, Montana
My Commission expires 1-21-1984

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 39577-s41E BY HOWARD KRUSE)
)

* * * * *

Pursuant to the Montana Water Use Act and to the Contested Case Provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Helena, Montana.

STATEMENT OF THE CASE

The present application seeks 350 gallons per minute up to 60 acre-feet per year for placer mining purposes from April 1 to August 31 of any given year. The source of supply is to be an unnamed tributary to High Ore Creek. The pertinent portions of this application were duly and regularly published for three successive weeks in The Montana Standard, a newspaper of general circulation printed and published in Butte, Montana.

On May 14, 1982, an objection to the instant application was filed with the Department of Natural Resources and Conservation on behalf of the Bureau of Land Management. This objection claims generally that the Applicant's proposed use would make it impossible to obtain water for livestock on downstream public domain land.

An objection to the instant application was also filed with the Department of Natural Resources and Conservation on behalf of the Montana Power Company. This objection claims and sets forth a number of water rights on the Missouri River which this

Objector claims will be adversely affected by the Applicant's proposed use.

PRELIMINARY MATTERS

The instant objection filed on behalf of the Montana Power Company is in the same tone and language as a number of similar objections filed against applications for new uses throughout the Missouri River drainage. Commencing with *In re Brown*, Proposed Order, 6/82, continuing through a number of similar applications, this Hearings Examiner concluded that the Montana Power Company will not, as a matter of law, be adversely affected by upstream uses. The Findings and Conclusions in such former dispositions, and the Orders based thereon, have for present purposes taken on the force of the stare decisis. See generally, Galiger v. McNulty, 80 Mont. 339, 260 P. 401(1927); Cook v. Hudson, 110 Mont. 263, 103 P. 2d 137(1940) ("Decree adjudicating water rights is admissible as evidence of such water rights in subsequent proceedings not involving parties to the original decree or those in privity of interest therewith.") Moreover, these Findings and Conclusions and Orders based thereon can for the limited purposes of this administrative hearing take on some of the force and effect of collateral estoppel, as the concerns prompt in the application of this doctrine partially exist in the present circumstances. See generally, Gessel v. Jones, 149 Mont. 418, 427 P. 2d 295(1967); Brennen v. Jones, 101 Mont. 550, 55 P. 2d 697(1936). Even if the present record and the records of the prior proceedings disclosed have minor variations, the concerns that prompt the aforesaid doctrines

warrant a similar disposition herein. The Department may use its "experience, technical competence, and specialized knowledge" in the evaluation of the evidence, MCA 2-4-612(7). For the reasons disclosed in such prior Orders, the Hearings Examiner recommends that Montana Power Company's objection in the instant matter be stricken. However, the Department need not rely on such prior dispositions, as alternative grounds exist for determining that Montana Power Company will not be adversely affected. Said basis is disclosed by the Findings of Fact and Conclusions of Law made herein.

Nothing herein shall be construed as determining that the Bureau of Land Management is the real party in interest as regards its asserted stock-watering rights. Whether this agency or its lessees is the owners of the water rights is immaterial to these proceedings. I have assumed a collection of rights as claimed in the objections by the Bureau of Land Management merely for the purposes of the present disposition.

FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter, and by the appearance of the parties hereto, has jurisdiction over the persons involved.
2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource.
3. The Applicant intends to use the waters claimed herein for placer mining. Such use of water would result in material benefit to himself. The proposed use of water a beneficial one.

CASE # 39577

4. The use of 350 gallons per minute up to 60 acre-feet per year is a reasonable estimate of the quantity of water required for the Applicant's purpose, and the use of this quantity of water will not result in the waste of the water resource.

5. The Applicant intends to divert the waters claimed herein from a certain unnamed tributary to High Ore Creek. The Applicant intends to divert the waters thereof at points along several miner placing claims. The waters will be returned to the source of supply via certain settling ponds.

6. The Applicant's proposed means of diversion are adequate for his intended purposes, and are a reasonable and customary method of diverting water for his intended purposes, and said means will not result in the waste of the water resource.

7. There are unappropriated waters available in the source of supply in the amounts the Applicant seeks throughout the period during which he claims the right to use the water at least in some years.

8. The Bureau of Land Management or its leasees use waters of High Ore Creek or waters to which such creek is tributary thereto for stock-watering purposes.

9. The Montana Power Company owns or controls a number of hydroelectric facilities on the Missouri River mainstem below Helena. The Montana Power Company uses water of the Missouri River for the production of hydroelectricity at all its facilities.

10. Montana Power Company's Cochrane facility has a capacity to use approximately 10,000 cubic feet per second for the

production of electrical power for sale, and has historically used such quantity of water for such purpose on occasion. The Montana Power Company at its Cochrane facility also maintains and controls a reservoir with an approximate capacity of 5,750 acre-feet. The Montana Power Company fills, refills, and otherwise successively fills this reservoir throughout the year.

11. The Missouri River flows in excess of 10,000 cubic feet per second on a reliable basis only at times of spring snow-runoff.

12. Throughout substantial portions of any given year, Montana Power Company has historically used far less than 10,000 cubic feet per second for the production of electrical power for sale at any or all of its facilities.

13. The source of supply claimed herein is tributary to the Missouri River.

14. The Applicant's use will be for all practical purposes non-consumptive, returning all the water diverted to the source of supply.

15. Immediately downstream of the Applicant's proposed place of use, and above the place of use of the Objectors herein, there exists a glacial moraine. This moraine has the effect of impounding waters underneath the ground in a gravel medium, behind a relatively impermeable geologic "membrane." This moraine does now control the amount of water available for downstream uses from the upper reaches of the source of supply from which the Applicant claims the instant water. Said moraine will control the amount of water available for downstream users after Applicant begins his water use.

16. The Applicant's proposed use will not adversely affect prior appropriators. His use will not inevitably capture waters otherwise inevitably and necessarily required for downstream use, nor will the change in the timing of water flow in the source of supply affect downstream users.

17. There are no water use permits or reservations which will be effected by the Applicant's proposed use.

18. Montana Power Company "follows load" with its hydroelectric resources. That is at times of electrical surplus coal-fired thermal facilities are shut down in deference to cheaper hydroelectric energy.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto, has jurisdiction over the persons. See generally, MCA 85-2-301 et.seq.

2. The Applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource. See generally, Toohy v. Campbell, 24 Mont. 13, 60 P. 396(1900), Compare Power v. Switzer, 21 Mont. 523, 55 P. 32(1898).

3. The use of the water claimed herein for placer mining purposes is a beneficial use. MCA 85-2-102(2).

4. The amounts of water claimed herein are a reasonable estimate of the quantity of water required for Applicant's purpose, and the use of said quantity will not result in the waste of the water resource. See, Worden v. Alexander, 108 Mont. 208, 90 P. 2d 160(1939), see also MCA 85-2-102(13).

5. The Applicant's proposed means of diversion are reasonable and customary for his intended purposes, and said means will not result in the waste of the water resource. See generally, State ex. rel. Crowley v. District Court, 108 Mont. 89, 88 P. 2d 23(1939).

6. The use of the water claimed herein will not unreasonably interfere with other planned uses for which a permit has already been issued or for which water has been reserved.

7. There are unappropriated or surplus waters available for the Applicant's use in the amounts he seeks throughout the period he seeks to use the water in at least some years. The Applicant's use will not adversely affect the rights of any prior appropriator, as such use will not inevitably or necessarily capture waters otherwise required for downstream demand, and at any time a scarcity, Applicant's use will be junior to such demand. See MCA 85-2-401(1981).

While the Applicant did not profess any formal education in the area of geology, the Hearings Examiner was impressed with his observations as regards the downstream glacial moraine. The Hearings Examiner believes his testimony as a product of the Applicant's practical experience in the area of placer mining. See generally, Worden v. Alexander, supra. By the evidence, this moraine functions as a sort of a funnel for downstream users. The bottleneck of the funnel limits at any given time the amount of water available for downstream uses.

The Applicant's use will be for all practical purposes non-consumptive. That is, his use will not use up any significant portion of the water resource. Therefore, adverse

effect to prior appropriators can occur only by any change in the pattern of flow effected by this Applicant's use. See generally, In re Edenfield, Department Order, 3/82. The moraine herein referred to assures little danger of such a change to any downstream user's detriment. Even if diversions are made via surface flow, and returned via the ground-water medium, the natural constriction of the glacial moraine combined with the forces of gravity will cause such percolating ground-water either to reappear as surface flow or to accumulate behind this geologic structure as it would have historically. For these reasons, the Applicant's use does not threaten inevitable injury to downstream rights.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued.

Application for Beneficial Water Use Permit No. 39577-s41E is hereby granted to Howard Kruse to appropriate 350 gallons per minute up to 60 acre-feet per year for placer mining purposes. The source of supply shall be a certain unnamed tributary to High Ore Creek, the waters thereof to be diverted at points in the NW1/4 NW1/4 NW1/4 of Section 12, Township 6 North, Range 5 West, and/or at points in the S1/2 SW1/4 SW1/4 and/or at points in the W1/2 E1/2 SW1/4, all of Section 1, Township 6 North, Range 5 West, in Jefferson County. The place of use shall be confined to the previously described areas. In no event shall the waters provided for herein be diverted prior to April 1 of any given year nor subsequent to August 31 of any given year. The priority date for this permit shall be December 21, 1981, at 12:00 noon.

This Permit is subject to the following express conditions,

CASE # 39577

limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

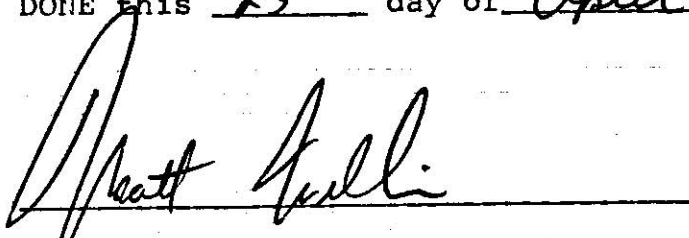
B. The Permittee shall in no event cause to be withdrawn from the source of supply more waters than are reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which may be caused by the exercise of this permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before May 5, 1983.

DONE this 25th day of April, 1983.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation

32 S. Ewing, Helena, MT 59620

(406) 449 - 3962

AFFIDAVIT OF SERVICE

PROPOSAL FOR DECISION

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 28, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Howard Kruse, Application No. 39577-s41E, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Howard Kruse, Box 86, Clancy, MT 59634
2. Montana Power Co., 40 E. Broadway, Butte, MT 59701
3. K. Paul Stahl, Atty., P.O. Box 1715, Helena, MT 59624
4. Bureau of Land Management, Box 3388, Butte, MT 59702
5. ~~Scott Compton, Bozeman Field Office (inter-department mail)~~
6. Matt Williams, Hearing Examiner (hand deliver)

Sent copy to Helena Field Office 5/12/83.

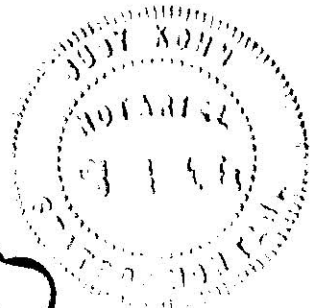
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 27th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Judy Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85